

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM) NOTICE OF AMENDMENT
2.5.201, 2.5.301, 2.5.302, 2.5.303,)
2.5.404, 2.5.406, 2.5.408, 2.5.502,)
2.5.601, 2.5.602, 2.5.604, 2.5.610, and)
2.5.701 pertaining to state procurement)
of supplies and services)

TO: All Concerned Persons

1. On December 26, 2013, the Department of Administration published MAR Notice No. 2-5-488 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 2332 of the 2013 Montana Administrative Register, Issue Number 24. On January 30, 2014, the department published an amended notice to reschedule the hearing on the same rules at page 141 of the 2014 Montana Administrative Register, Issue Number 2.

2. The department has amended ARM 2.5.301, 2.5.302, 2.5.303, 2.5.404, 2.5.406, 2.5.502, 2.5.601, 2.5.602, 2.5.604, and 2.5.701 exactly as proposed.

3. The department has amended ARM 2.5.201, 2.5.408, and 2.5.610 as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

2.5.201 DEFINITIONS (1) through (20) remain as proposed.

(21) "Minor enhancements" means routine operations and maintenance support activities that include corrective, adaptive, and perfective changes, and that do not introduce new major functional capabilities.

(21) through (34) remain as proposed, but are renumbered (22) through (35).

(35)(36) "Software maintenance" means patches, support, or upgrades and minor enhancements allowing the software to continue to perform its functional purposes function as originally specified in the statement of work, contract, or other procurement agreements.

(36) through (47) remain as proposed, but are renumbered (37) through (48).

2.5.408 RECIPROCAL PREFERENCE (1) through (5) remain as proposed.

(6) Reciprocal preferences do not apply to term contracts unless the term contract is applicable only to agencies that do not receive federal funding.

2.5.610 COOPERATIVE PURCHASING (1) remains as proposed.

(2) For the purposes of complying with 18-4-221, MCA, the following definitions apply:

(a) through (d) remain as proposed.

(e) "any other entity that expends public funds for the procurement of supplies and services" means an Internal Revenue Code 501(c)(3) organization, as

that statute reads on May 23, 2014, that expends public funds for the procurement of supplies and services.

(3) Nonprofit corporations that wish to enter into an agreement with the state for the cooperative use of supplies or services shall provide the division with documentation that they are or will be lawfully authorized to spend or receive public funds.

(4) ~~Participation in any cooperative solicitation or contract is permitted~~ An agency may participate in a cooperative contract if the following conditions are met:

(a) ~~the division is able to provide~~ adequate public notice of the solicitation to interested vendors; and

(b) ~~any contract that the division opts to participate in must include~~ the contract or purchase order includes all the statutorily required terms and conditions.

(5) ~~If the conditions of (4)(a) and (4)(b) are not met, the division may reject participation in the cooperative solicitation or contract.~~ If an agency wishes to participate in a cooperative contract, and (4)(a) has not been met, the division shall provide adequate opportunity for public participation by either:

(a) issuing a solicitation for the supply or service and including the cooperative contract as a response; or

(b) providing notice of the intent to purchase from the cooperative contract and allowing interested vendors a reasonable time to submit a response to the notice.

(6) The division may exempt an agency from the requirements of (4)(a) and (5) if it is shown to be in the best interests of the state.

4. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses follow:

COMMENT 1: The language as proposed in ARM 2.5.201(35) is narrower than the industry definition of software maintenance. This will limit our ability to provide adequate, timely service to the citizens of Montana. Although we recognize and agree with the need to have competitive procurements, we also recognize that information technology has some unique needs. However, this narrow definition of software maintenance will likely result in lower competition as fewer vendors will be willing to take on the additional risks.

RESPONSE 1: The department agrees with comment 1 and has amended the rule as shown above.

COMMENT 2: ARM 2.5.301(2)(j) appears to eliminate the training exemption. Does this proposed amendment mean that we are now required to utilize competitive bidding for all training-related purchases?

RESPONSE 2: The department isn't eliminating the training exemption; rather, just eliminating the redundancy of training from (2)(j). As stated in the proposal notice, (2)(i), which includes training, will remain the same.

COMMENT 3: In reference to ARM 2.5.406(1), is it correct that if the solicitation was issued by the agency, and the protest mailed to both the division and the agency, only the agency handles the protest?

RESPONSE 3: Yes, that is correct. If the solicitation was issued by the agency, the agency must handle the protest.

COMMENT 4: The addition of ARM 2.5.408(6) does not follow the original intent of 18-1-102(2)(b), MCA.

RESPONSE 4: The department agrees with comment 4 and has amended the rule as shown above.

COMMENT 5: The Legislative Services Division provided comment regarding ARM 2.5.610(2)(e) requesting that the department include clarification that it is not delegating rulemaking authority to the federal government, and to clarify what the applicability date will be for the definition of 501(c)(3).

RESPONSE 5: The division agrees with comment 5 and has amended the rule as shown above.

COMMENT 6: The changes to ARM 2.5.610(4) and (5) unduly limit an agency's ability to purchase from cooperative contracts. An agency would benefit from being provided the option to, after something has already been bid, purchase from a cooperative contract so long as we give adequate public notice of the intent to purchase through the co-op. Someone can still beat their bid that way, and of course we'd go with the lowest cost, but it wouldn't preclude us from using a preexisting bid just because we couldn't predict our needs or didn't know about this particular cooperative and didn't get in on the solicitation at the outset.

RESPONSE 6: The division agrees with comment 6 and has amended the rule as shown above.

ADDITIONAL CLARIFICATION: At its own discretion, the division has removed the phrase "or receive" from ARM 2.5.610(3) so as to remain consistent with statutory language.

By: /s/ Sheila Hogan
Sheila Hogan, Director
Department of Administration

By: /s/ Michael P. Manion
Michael P. Manion, Rule Reviewer
Department of Administration

Certified to the Secretary of State May 12, 2014.